

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MARBURN ACADEMY, INC.

and

Case 09-CA-224092

MICHQUA LEVI, AN INDIVIDUAL

Erik Brinker, Esq.

for the General Counsel

Jan E. Hensel and Jacqueline N. Rau, Esqs.

for the Respondent

Justin A. Morocco, Esq.

for the Charging Party

DECISION

I. INTRODUCTION¹

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This case was tried on December 20-21, 2018,² in Columbus, Ohio, based on allegations that Marburn Academy, Inc. (“Respondent”) violated Section 8(a)(1) of the National Labor Relations Act (“Act”) when it disciplined and later failed to renew/terminated Michqua Levi’s employment because of her protected activity. In early April, Levi spoke with fellow teachers about workplace concerns, including, among others, the teacher pay scale and the display of favoritism. Following those discussions, Levi informed her co-workers that she planned to email the chairman of the school’s board of directors about the concerns, and she urged them to do the same. On April 10, Levi emailed the chairman about these and other concerns. Thereafter, the head of school demanded that Levi meet with him about the email and her attempts to recruit others to write letters to complain about the leadership. Following that meeting, on May 7, the head of school issued Levi a written warning for sending the email, for failing to follow the school’s problem-solving system, and for creating divisiveness by asking staff “to join [her] letter writing campaign.” He also issued Levi a corrective action plan that conditioned her continued employment on her refraining from this sort of conduct in the future. Levi later shared the warning and corrective action plan with coworkers and board members and referred to it as an “extortion contract.” Upon learning of this, the head of school withdrew Levi’s contract for the 2018/2019 academic year, thereby terminating her employment.

The General Counsel contends Levi was engaged in, or was believed to have been engaged in, protected, concerted activity, and Respondent disciplined and later ended her employment because of those activities, in violation of Section 8(a)(1) of the Act. Respondent contends Levi’s conduct was not protected or concerted, but rather personal griping stemming from her dissatisfaction with her annual performance evaluation and related wage increase. For the reasons stated below, I find Respondent violated the Act as alleged.

¹ Abbreviations in this decision are as follows: “Tr.” for transcript; “GC Exh.” for General Counsel’s Exhibits; “R. Exh.” for Respondent’s Exhibits; “GC Br.” for General Counsel’s brief; “CP Br.” for Charging Party’s brief; and “R. Br.” for Respondent’s brief.

² All dates refer to 2018, unless otherwise stated.

II. STATEMENT OF THE CASE

On July 20, Levi filed the unfair labor practice charge against Respondent in this case. On October 30, the Regional Director for Region 9, on behalf of the General Counsel of the National Labor Relations Board, issued a complaint alleging that Respondent's statements and conduct violated the Act. On November 13, Respondent filed its answer denying the alleged violations and raising certain defenses.

At the hearing, all parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent, Charging Party, and General Counsel filed post-hearing briefs, which I have carefully considered.³ Accordingly, based upon the entire record, including the post-hearing briefs and my observations of the credibility of the witnesses, I make the following findings, conclusions of law, and remedy and recommended order.

III. FINDINGS OF FACT⁴

A. Jurisdiction

At all material times, Respondent has been a corporation with an office and place of business in New Albany, Ohio, and has been operating a private, not-for-profit independent day school serving grades 2 through 12, focusing on students with learning difficulties and attention issues. In conducting its operations during the 12-month period ending October 15, Respondent derived gross revenues in excess of \$1 million. During this time period, Respondent purchased and received at its school products, goods, and materials valued in excess of \$5,000 directly from points outside the State of Ohio. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the foregoing, I find this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

B. Respondent's Hierarchy

Respondent's school is divided into three divisions: lower (grades 2-5), middle (grades 6-8), and high school (grades 9-12). The teachers in each division report to a division head. The division heads report to the associate head of school, Scott Burton. Burton oversees the day-to-day operations of the

³ Respondent filed a motion to strike the General Counsel's post-hearing brief because it exceeded the page limit, but then Respondent withdrew the motion following clarification regarding the scope of the page-limit requirements.

⁴ Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record. The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as having been in conflict with credited testimony or other evidence, or because it was incredible and unworthy of belief. In assessing credibility, I primarily relied upon witness demeanor. I also have considered factors such as: the context of the witness's testimony, the quality of the witness's recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd. sub nom.*, 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, *supra* at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), *revd. on other grounds* 340 U.S. 474 (1951)).

school, and he reports to the head of school, Jamie Williamson. Williamson reports to the board of directors, led by chairman Brian Hicks.⁵

C. Background

Michqua Levi has been teaching for over 30 years. She began working for Respondent as a full-time teacher in 2012. During the 2017/2018 school year, Levi co-taught second and third grade with fellow teacher, Angie Bell. As a full-time teacher, Levi worked under a one-year, non-renewing employment contract. Every spring, Levi received her individual contract setting forth her salary for the upcoming school year, and she separately received her performance evaluation for the current year.

Teachers and staff also receive an updated copy of the employee handbook. The handbook contains Respondent's policies and procedures. Among them is the Marburn Problem Solving System ("MPSS"), which states, in pertinent part:

Core Principles

...

The core principle of the problem-solving system is that the conflict resolution dialogue should occur between the particular individuals who are in disagreement or conflict.

With the exception of the role of the moderator mentioned below it is expected that the individuals who are not directly involved in the disagreement will not become involved as parties to the conflict. However, nothing herein is intended to limit employees' rights to engage in concerted activity as protected by the National Labor Relations Act.

We believe that this principle applies equally to all members of the Marburn community including students, teachers, administrators, parents, and trustees, and that it should guide resolution of conflict at all of those levels.

In the following circumstances, an additional party may be productively involved in the problem solving process: An individual who is party to a dispute or disagreement may legitimately elect to process the situation confidentially with a trusted friend or advisor as a way of preparing for a conflict resolution dialogue. Just as a teacher may serve as a moderator when students are engaged in resolving a dispute, it may be useful for the adult parties in a conflict resolution dialogue to agree on a trusted and neutral third party to serve as moderator of the discussion.

On other occasions, an administrator may use his or her authority to convene and moderate a dialogue between the parties to a disagreement.

⁵ The parties stipulated that Williamson, Burton, and Beth Weakley (chief financial officer) are supervisors and agents of Respondent within the meanings of Section 2(11) and 2(13) of the Act, respectively. (Tr. 16). The complaint alleges Hicks is a statutory supervisor and agent, which Respondent denies. Based on his position as board chairman, and his communications on behalf of the school (as described below), I find Hicks is a Section 2(13) agent of Respondent because employees could reasonably believe that he speaks for management. *Zimmerman Plumbing & Heating Co.*, 325 NLRB 106 (1997) *enfd.* in relevant part 188 F.3d 508 (6th Cir. 1999). However, I do not find Hicks is a statutory supervisor. The Act defines a supervisor as an individual having certain authority *over other employees*. The only individual Hicks oversees is Williamson, a Section 2(11) supervisor, and, therefore, not an "employee" under Section 2(3) of the Act. (Tr. 477).

Our experience has demonstrated that productive resolution of conflicts or disputes does not occur in large group meetings or in public. Consequently, we encourage employees to follow the guidelines set forth in the [MPSS] rather than airing disagreements in group meetings or public meetings. Again, our encouragement of employees to utilize this method of resolving conflict shall in no way infringe on employees' right to engage in protected concerted activity under the National Labor Relations Act.

Guidelines for Responding to School Decisions by Parties to a Disagreement

When a duly constituted decision-making authority renders a decision in a case in which parties have been in significant disagreement, parties should in general avoid prolonging the dispute by sharing the issue with other constituencies for the purpose of "enlisting allies" to help modify or reverse the decision.

Guidelines for Employee Response

Employees are encouraged to follow the provisions of the MPSS as (?) both when seeking resolution of problems and when responding to decisions made by responsible school authorities.

...

(GC Exh. 13, p. 8-9).

D. Alleged Unfair Labor Practices

1. Performance Evaluation and Contract Offer

In early March, Levi met with her division head, Miriam Skapik, and received her performance evaluation for the 2017-2018 school year. These written evaluations list the teacher's areas of strength and areas to improve.⁶ (GC Exh. 4). On March 16, Levi met with the associate head of school, Scott Burton,

⁶ In Levi's evaluation, there was a reference to an "incident" involving the marketing director, Erin Barr. (Tr. 39-40). This incident occurred on Friday, January 19, when Barr was filming a promotional video/interview of a parent in the common area outside of Levi's classroom. Levi unknowingly interrupted filming by walking in and out of her classroom. There was a brief verbal exchange between Levi and Barr about the interruption. Later that day, Levi emailed Barr stating she did not appreciate being yelled at and treated like "some bitchy employee" in front of a parent. (R. Exh. 3). Levi sent a copy of the email to head of school Jamie Williamson, along with a description about what happened. In her email, Levi stated the administration's failure to notify the teachers about the filming was an example of the "lack of communication" she previously had mentioned to Williamson as being an issue. That night, Barr emailed Levi to apologize for what happened at school. Levi emailed back, accepting Barr's apology and apologizing for disrupting the filming. (R. Exh. 3).

On Monday, January 22, Williamson met with Levi. He commented on the tone of Levi's email and suggested it would have been better for her to have had a conversation with Barr, rather than to send an email. In the meeting, and in a follow-up email, Levi told Williamson that Barr was waving her hands in Levi's face, and it would not have been appropriate for Levi to talk to Barr at that moment because Levi was upset, and she left as quickly as she could "without reacting inappropriately by slapping [Barr's] hands away and yelling back at her." (R. Exh. 5). From Levi's perspective, Williamson was blaming her for an incident in which she believed she had been the victim. Williamson scheduled an MPSS meeting for the three of them. (R. Exh. 4). At this meeting, Barr and Levi talked and resolved the matter. After the meeting, Williamson pulled Levi aside and told her he had reviewed a video recording of the incident, and he accused Levi of exaggerating Barr's conduct during the incident. Levi asked to see the video to explain what happened, but Williamson refused. Later, Williamson informed Skapik about what had occurred, but no further action was taken against Levi or Barr.

Following her evaluation, Levi was upset that Williamson had shared the contents of the January MPSS meeting with Skapik because the MPSS process is supposed to be kept confidential. Levi also was upset that Skapik referred to the incident--which had been resolved--in Levi's evaluation. (Tr. 40-41).

who presented Levi with her individual employment contract for the 2018/2019 school year. The contract stated Levi's salary would be \$59,230.00, which was a 4-percent increase from the prior year. (GC Exh. 3). Levi later asked Burton for more time to decide whether to sign her contract because of certain family matters, which Levi discussed with Burton. Burton gave Levi until April 6.

5 2. Discussions about Pay and Salary Scale

In early April, before she signed and returned her contract, Levi spoke with other teachers about their pay and how it was determined. She learned Respondent had a written pay scale for teachers. She asked Burton for a copy and he provided her with one. The scale was set up as a table with the annual salary ranges or bands divided (in rows) by the teacher's years of experience (i.e., 0-3 years, 4-6 years, 7-10 years, and 11+ years) and (in columns) by the teacher's performance rating (i.e., progressing, meets expectations, and exceeds expectations). According to the scale, teachers, like Levi, with 11+ years of experience are paid between \$56,268 and \$60,207 if they are progressing, between \$59,081 and \$63,217 if they meet expectations, and between \$62,035 and \$66,378 if they exceed expectations. (GC Exh. 5). Although these ratings are contained on the teacher pay scale, the evaluations do not contain ratings, and teachers do not receive a document stating whether they are progressing, meeting expectations, or exceeding expectations.

Levi reviewed her evaluations and determined that her salary for the 2018/2019 school year fell between the higher end of the "progressing" range and the lower end of the "meets expectations" range. This upset her because she believed her performance exceeded expectations. (Tr. 45-46). She spoke to Burton about the matter, and he informed her that the administration was in the process of developing a rating system and "the scale wasn't really completed yet" and the one she had "wasn't accurate." Levi then asked why the school had a scale without any criteria for ratings, and could they get rid of it. (Tr. 46). The record does not reflect if Burton responded to Levi about this.

After speaking with Burton, Levi spoke with several other teachers about the pay scale and whether they believed they were being paid correctly under the scale. Levi spoke to a dozen teachers, including her co-teacher, Angie Bell, and Dr. Christopher Geisler, the music teacher. Bell and Geisler both confirmed they were not being paid correctly and were upset about it. (Tr. 59-71).

3. Gala Announcement

At around the same time, Respondent sent out an announcement regarding its upcoming "gala." (GC Exh. 6). The gala is an annual fundraising event Respondent holds to raise money for student scholarships. In the past, Respondent asked teachers and staff to sign up to volunteer to work the event, and then sit for dinner with the parents and donors. This year, the announcement set forth three options for staff. Option 1 was to volunteer to work the event. These individuals may or may not be seated at the tables for dinner, but they would receive a meal. Option 2 was for those people selected by the head of school or another member of management to attend as an "ambassador" and to sit with a specific group or table, at no cost. Option 3 was to attend the dinner at a reduced price. (GC Exh. 6).⁷

⁷ Part of the reason for the change was that the gala had been moved from a larger venue to a smaller venue, leaving less room to seat everyone for dinner. (Tr. 146-147). Also, at the hearing, Respondent introduced evidence that the second option only applied to administrators, division heads, and directors who were required to attend the gala; teachers were not required to attend, so this option did not apply to them. (Tr. 338-339). Williamson testified it was his "understanding" that administrator Lucy Godman informed the teachers what option 2 meant. (Tr. 339). Williamson did not testify when Godman allegedly informed the teachers of this, and she was not called to testify.

Levi was upset by this announcement, believing that it demonstrated favoritism for the faculty or staff that management selected to attend for free and sit with the parents and donors as ambassadors. She spoke with Geisler, as well as other teachers, about the announcement. She learned that Geisler and some other teachers shared her concerns. (Tr. 59-61). Levi later informed one of the organizers of the gala, as well as a member of the board of directors, that the options were offensive, and that was why she and other teachers were not going to attend that year. (Tr. 54-55; 69-71) (R. Exh. 17, p. 1).

4. April 10 Email to Chairman Hicks & Responses

At the time this was occurring, Respondent did not have a human resources representative, and Levi and the other teachers did not know who to go to with their questions or concerns, and they were concerned about retaliation if they went to Williamson or Burton. After reviewing the employee handbook, Levi spoke to a Sharon Wolfe, a member of the board, about who teachers could go to with their concerns. Wolfe suggested that Levi send an email the board's chairman, Brian Hicks. Wolfe provided Levi with Hicks' email address. (Tr. 74-75).

Levi informed several teachers she was going to email Hicks about the concerns, and she asked six or seven of them to do the same. (Tr. 76-78). Levi explained to them that the more letters Hicks received about their shared concerns, the more likely the concerns would be noticed than if it was just her "taking one for the team." (Tr. 77). Most of the teachers told Levi they would not write letters out of fear of losing their jobs, but they requested that Levi send her letter to Hicks. (Tr. 77-78).

Levi prepared a draft email to Hicks and then showed it to Geisler to confirm it had the points they discussed. Geisler told Levi the email looked good, and that he was going to send one to Hicks as well. (Tr. 76-77)(Tr. 259-260).

Geisler later prepared and sent an email to Hicks asking general questions about the gala and the teacher pay scale. Geisler testified he kept his email general because he expected to have the opportunity to meet with Hicks and discuss those concerns in greater detail. (Tr. 259-260).⁸

On April 10, Levi sent her email to Hicks. It reads, in pertinent part, as follows:

Dear Mr. Hicks,

I am the 2/3 teacher at Marburn am writing to you as I feel very unsupported and have no trust in our current leadership here at school [...] Have way too many concerns to type up in this email to you, however, I am writing to you as we have had no HR person since December nor did she even address issues brought to her in the couple of months she was here. I will list just a few of the greater concerns so you can get a general idea and would be happy to meet with you if you want more details.

1. I am working here at Marburn because I believe in what we do and the students we help (my daughter attended Marburn in middle school so I am also a former parent). This year I did

⁸ Geisler testified he sent the message to Hicks, but there was no record it was received, or returned as undeliverable. (Tr. 259-260). I found Geisler to be a credible witness with an honest and sincere demeanor. I credit that he prepared and sent the email to Hicks, but, for whatever reason, it was not received or returned. As a current employee who provided testimony adverse to the interests of his employer, I find his testimony was entitled to additional weight. The Board has held that where current employees provide testimony against the interests of their employer, and thus contrary to their own pecuniary interests, such testimony is entitled to additional weight when credited. See *Avenue Care & Rehabilitation Center*, 360 NLRB 152, 152 fn. 2 (2014); *Advocate South Suburban Hospital*, 346 NLRB 209, 209 fn. 1 (2006); and *Flexsteel Industries, Inc.*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996). To the extent Geisler's testimony conflicts with that of another witness, I credit Geisler.

NOT want to sign a contract to come back. I reluctantly signed it in hopes things will change for the better. I, as well as numerous other staff members, have applied elsewhere for new jobs.

2. The staff morale here is at an all time low! There is a feeling that Mr. Williamson shows favoritism and lack of respect for many teachers. Options 1 and 2 of the faculty sign up for the Gala was just 1 example of how little Marburn feels about their teachers. Several of us let [administrators and staff] know how disturbing options 1 and 2 were to the staff, yet nothing changed, again confirming how admin feels about the staff. PS: many staff members who attended/donated to the gala in the past will not be there this year...that is why!

3. The pay scale grid shows an inaccurate breakdown of staff compensation as Mr. Burton said we are not 'there yet'. If that is the case, why is it "written that way" and what is the criteria for raises?

4. Communication seems worse now than ever before. Too many examples to list!

5. Where was our Headmaster during the school play? Athletic events? etc. Teachers, students AND parents notice this!

6. We are a school that advertises remediation for struggling students, yet we have larger remediation classes that ever before and teaching to standards at grade level in math! We have had a questionable math program for years and yet again, we are getting a math program next year that lower division teachers were not even consulted about until it was a "done deal ". No respect for their input before making a decision.

So many people are very afraid to share things with admin for fear of losing their jobs. Lots of upset teachers sharing their grip[e]/mistrust, etc. to each other because they don't know what to do, who to go to and certainly do not feel supported or trust the administration. I have share[d] some of my concerns with you and told other[s] to do so as well. I understand if they don't come forth, there is nothing that can be done. I just did not want to be one of those people that did not give you a heads-up before taking another job somewhere else if I am offered. I hope things get better here soon... I truly love Marburn, our students, parents and my colleagues and have been a big supporter for many years.

(GC Exh. 7).

Levi's co-teacher, Angie Bell, also sent an email to Hicks. In her email, dated April 11, Bell states she had been informed Hicks was the contact point for work-related issues at Marburn, and she had concerns "with some administrative decisions." (R. Exh. 38). She asked whether the school would be hiring a human resources representative to go to with concerns, and added she knew "this sentiment is common throughout the school." She also believed "an anonymous survey" to the staff "asking about concerns in the building" would be helpful in gauging their temperatures on matters. (R. Exh. 38).

On April 12, Hicks separately emailed Levi and Bell with essentially the same response. He thanked them for their commitment to the school and their passion for its students, and said he understood that all of the decisions that have been made may not be universally supported and that recent changes have been stressful. He went on to emphasize that one of the school's core principles is open communication, and that the board intentionally defers operational matters to the head of school and stands behind the school's successful and proven problem-solving process. Hicks encouraged them to follow that process, by speaking with their division head, Burton, and, ultimately, Williamson. Hicks expressed confidence in this process and the school leadership to appropriately address issues like the ones Levi and Bell shared in their emails. He also stated he was copying Williamson on his emails to them. (R. Exhs. 12 and 38).

Later that same day, Levi emailed Hicks, stating she had gone through Respondent's problem-solving process before and it was not successful, which is why she was contacting him. She also expressed

her disappointment that Hicks had shared her email with Williamson, and that Hicks had now put her in an uncomfortable situation by doing so. (R. Exh.13). On April 13, Williamson emailed Levi about scheduling a meeting to discuss the concerns she had raised in her letter to Hicks. (R. Exh. 14). At the time, Levi was on a trip with her husband.

At around this time, Williamson met with Angie Bell. (Tr. 342-343). Bell did not testify at the hearing, but Williamson testified they met and she voiced her concerns. On April 22, Bell sent a second email to Hicks apologizing for her earlier email and thanked him for directing her to Williamson. Bell stated she and Williamson had spoken and he had alleviated her concerns greatly. (R. Exh. 39).

On April 23, following her return from her trip, Levi sent Hicks an email that Williamson had requested a meeting to discuss her April 10 email and she was not comfortable meeting with Williamson. Levi stated that her previous meetings with Williamson were extremely stressful and that she could not go through another one. Levi concluded by stating the email she had sent to Hicks on April 10 was “to inform the board about concerns already discussed with administration, not for answers.” (GC Exh. 9). Hicks responded to Levi’s email that day, stating that his advice was for her to meet with school leadership to address her concerns if she wanted to have them addressed, but if all she wanted to do was inform the board of those concerns, she should consider that accomplished. (GC Exh. 9).

On April 25, Williamson sent Levi an email, stating that Hicks had forwarded to him her April 10 and 23 emails. Williamson noted there were a number of issues they needed to discuss with her:

For example, we have learned that you have attempted to recruit others to write letters to the Board Chair to complain about the leadership. You have repeatedly expressed your dissatisfaction with your position here. Your current conduct is extremely disruptive and divisive. Please note that not meeting with me is not an option; it is not feasible to have a teacher who refuses to meet with the head of school.

(GC Exh. 10).

On April 26, Levi emailed Williamson back, stating she was disturbed by the accusations in his email. (GC Exh. 10). Levi pointed out that she had already shared the concerns with him and other administrators before going to Hicks. She stated that because there was no human resources representative, she did not know who else to go to, so she reviewed the employee handbook and concluded that she should go to the board chairman. Levi also denied attempting to “recruit” others to write to Hicks. She stated the staff had been talking all year about a variety of concerns at the school, and one of the biggest concerns was they did not feel supported and did not know who to go to with issues when there was no human resources representative. She stated that when staff members asked her what she would do, she referred them to the handbook provision identifying the chairman as someone employees could go to with concerns. Levi also stated teachers requested that she complain on their behalf as they were afraid to lose their jobs. When teachers raised this concern, Levi pointed out that the handbook had an anti-retaliation provision. Levi also stated she told these teachers that she could not speak for them and they had to speak for themselves and share their concerns.

5. April 26 Meeting

On about April 26, Levi met with Williamson, Burton, and Beth Weakley, the chief financial officer, regarding Levi’s April 10 email to Hicks. Williamson began by asking Levi if she wrote her email “to get him fired.” (Tr. 95) Levi denied that was her intention and explained she was trying to make the chairman aware of concerns she and others had. Williamson stated he did not care about the others; he was

only concerned about her. He also told Levi not to use the words “us” or “we.” Levi pointed out that the concerns were not just hers. (Tr. 96).

They then went through the points in Levi’s April 10 letter. On the issue of the teacher pay, Levi pointed out that the scale was inaccurate and there were no established criteria for how teachers were rated. She stated that she was upset about her salary increase because it indicated that she was in between progressing and meets expectations, when she believed she had been exceeding expectations. They also discussed the process Levi went through, or failed to go through, in raising her concerns.

During the meeting, Williamson accused Levi of trying to recruit 15-20 other staff members to write to Hicks about the administration, which Levi denied. Levi stated that she had given Hicks’ contact information out to several employees in response to their questions about who they could contact about their concerns. (Tr. 100). Levi did not provide specific information about who all she spoke to because she was concerned about retaliation. The meeting lasted over an hour.⁹

6. Conversations Between Burton and Teachers about Levi

On around April 27, Burton approached Geisler and stated that there were rumors he and Levi were asking questions and writing board members. Geisler confirmed that was correct. Burton then asked Geisler to email him exactly what Geisler and Levi had discussed regarding the gala, the pay scale, or anything else, because, according to Burton, it was “dividing our community.” (Tr. 261). On April 30, Geisler prepared and sent an email to Burton, stating that he “was approached by Michqua Levi two weeks ago with a note containing board president Brian Hicks contact information to address complaints regarding the head of school in the absence of an HR representative. She was told by members of the board to contact Brian with concerns she or others were having with administration.” (GC Exh. 12). Burton later approached Geisler again and asked him to modify the email to state that Levi had coerced or attempted to coerce Geisler into sending a letter to the board chairman. Geisler refused, stating that was untrue. (Tr. 262-263).

At around the same time, Burton approached another teacher, Robyn Delfino, and asked if Levi had contacted her about writing Hicks. Delfino confirmed that Levi had, and Burton asked her to prepare an email about those communications. (Tr. 440-445). On April 30, Delfino sent Burton an email stating that Levi provided her with Hicks’ email address and stated she would like to have Delfino, as well as anyone else who has/had an issue with school administration, email the board and “air our grievances.” Delfino indicated that Levi told her that 10-15 teachers were going to send emails in order to make sure that the board was aware of the issues the administration did not resolve or handle properly. (R. Exh. 36).

⁹ After the meeting, Levi sent a text message to board member Sharon Wolfe. In the text, Levi thanked Wolfe again for all of her advice and support, but unfortunately the meeting with Williamson, Burton, and Weakly went as expected. Levi stated Williamson and Weakly were “pissed” that she had sent a letter to Hicks with complaints, telling her that he was the wrong person to contact, and that she always was supposed to go through Williamson. They also told Levi that she “had no business voicing concerns about how others feel.” In the discussion about the pay scale and the gala, they told Levi she had handled those concerns incorrectly. Levi stated in her text to Wolfe that she was way too tired to think and felt unsupported before the meeting ever happened, so she gave up. She said Williamson asked her a couple times if she trusted this administration and she said no. Levi then stated in her text that “I hope he fires me. I do not want to work for Marburn under his ‘leadership’. I know that no matter what they say or believe to be true...it won't change [the] way the majority of the teachers feel about things right now.” (R. Exh. 17, pp. 4-5).

7. Summary of Concerns and Corrective Action Plan

Williamson, Burton, and Weakly met with Levi again on May 7. Williamson presented Levi with a Summary of Concerns and a Corrective Action Plan. The Summary of Concerns states as follows:

As the school year has progressed, there are a few critical issues that need to be addressed in order to move forward in a constructive manner. You have numerous skills and talents, and have done tremendous work for students. However, it has become clear that you are engaging in behaviors that run counter to the core values and problem-solving practices within our community. These are critical issues that need to be resolved. This memo serves as the official follow-up to the conversation we had on April 26, 2018, with Scott Burton and Beth Weakley present. We discussed the following concerns:

Communication

On two separate occasions, we have discussed your use of inflammatory, aggressive, and/or provocative language when you are upset or frustrated with the situation. At Marburn, we are explicit in our values that each community member must communicate in an open, honest, and respectful manner. You signed-off on your agreement to these values during the contract process this year and last year. The language we use to describe a situation or your feelings is important. When we are attempting to work through an issue our language can either help solve a problem or work to create more issues. The latter was clearly evident in your choice of language used during the email exchange with Erin Barr earlier this year, in emails you sent to Brian Hicks, and in conversations you had with me. You're quick to use and defend the use of this language, and you have struggled to acknowledge the impact that it has on the situation and on those around you. This kind of behavior can have an incredibly negative impact within our community and will not be tolerated.

Problem-Solving

This is your 6th year in our program. As you should well know by now Marburn is deeply committed to the problem-solving approach that is designed to emphasize the resolution of conflict through dialogue, the truthful acceptance of responsibility, and the willing acceptance of the consequences of one's own behavior. Marburn Problem-Solving Process (MPSS) is clearly documented and available in our employee handbook. The core principle of the problem-solving system is that the conflict resolution dialogue should occur between the particular individuals who are in disagreement or conflict.

In your email to Brian Hicks, you stated that you used the MPSS but have been unsuccessful in your efforts. However, in our conversation on April 26th it became clear that you had not actually problem-solved with the appropriate individuals at all, but rather complained to a few individuals before sending a summary of your complaints to Brian Hicks. Further, you stated initially that many of the complaints you were sharing actually belong to "everyone" and that you were not seeking any resolution to these complaints. While you refused [to] take ownership of these complaints, you did eventually acknowledge that you were "frustrated" by these issues. You also stated that you thought you had followed the MPSS and then apologized for not using the appropriate channels in the MPSS. However, after apologizing you remarked on how hard it would've been to go through all those meetings, which seemed to cast the apology in a less sincere light. When asked what you were hoping to accomplish through your email, you stated that you were not seeking any resolution to the complaints that you have brought forward, but simply wanted to inform the board. The tone and content of your message seem to suggest that you wanted things to "get better" or you were going to take a job

somewhere else, which certainly suggests that you were seeking some resolution through this email. Your contradictory statements make honest productive communications extremely difficult, and hinder efforts to achieve resolution.

Divisiveness

In your email to Brian Hicks you stated that you were sharing some of your concerns and that you have “told others to do so as well.” In your conversation and in your written response to my April 25, 2018 email to you, you adamantly denied recruiting or soliciting anyone else to join you in writing to Brian, stating that you only share Brian’s contact information to staff members that approached you about their concerns. However, it is come to our attention that your denials are not true. We have had conversations with staff members who have shared that you approached them a few times in an attempt to convince them to join you in your letter writing campaign, even following-up to see if they had sent a message. The staff members also stated that in those conversations you said that you were working to get around 15-20 people to join you in order to make the board aware of issues with the administration.

This type of behavior runs counter to our values, our problem-solving process, actively undermines our community, and contributes to a toxic culture. This conduct is completely unacceptable at Marburn. I am well aware that you disagree with some key decisions that have been made over the course of the school year. As I’ve stated multiple times, I am always happy to listen to staff concerns and I value your input. However, your conduct suggests that you feel that if your feedback wasn’t acted upon, then you weren’t heard. Our decision-making process includes gathering multiple viewpoints, and using that data to make the best decision for the organization. When decisions are made that are contrary to your stated desires, you need to share your concerns with the appropriate people, accept the organizational decision, and move on.

Contract for 2018-2019 School Year

Given your long list of complaints, and your stated distrust of the administration, in particular me, Scott and I cannot in good faith sign the contract that you returned. In order for us to feel comfortable signing and accepting your contract for the upcoming school year, we need the following:

- 1) Your demonstration that you have taken ownership of the aforementioned issues;
- 2) a clear and genuine commitment to moving forward in a positive and cooperative manner;
- 3) and a signed corrective action plan addressing specific steps that you will take to improve your communication, problem-solving, and refrain from further divisive behavior.

Summary

In summary, this pattern of behavior is unacceptable. In order for you and I to continue to work together, we must be able to trust one another. Should you fail to act in accordance with the forthcoming corrective action plan, you will be subject to disciplinary action up to and including termination.

(GC Exh. 11).

The Corrective Action Plan addressed communication, problem-solving, and divisiveness. The problem-solving and divisiveness provisions state as follows:

Problem-Solving

1. Agrees to follow the MPSS and work through the appropriate channels when a disagreement arises.
2. Commits to seeking out the LD Division Head, Associate Head, and/or the Head of School to assist in the process.
3. Commits to approach problem-solving constructively with [an] open, honest, respectful, and transparent manner.
4. Remains open and non-defensive to feedback in the problem-solving process.
5. Schedules weekly meetings with the LD Division Head and Associate Head to proactively work through issues as they come up.
6. Will accept organizational decisions and move forward in a positive and productive way.

Divisiveness

1. Commits to ceasing all active solicitation and recruitment of others to support your personal complaints and dissatisfaction.
2. Agreement to not retaliate against two staff [sic] that were solicited to join the email campaign.

As a condition for employment, this plan will be in effect for the duration of the 2017-2018 school year and through the end of the 2018-2019 school year. A written summary of progress will be provided on a quarterly basis. Should you fail to act in accordance with this corrective action plan, you will be subject to disciplinary action up to and including termination.

(GC Exh. 11).

At the conclusion of the meeting, Williamson told Levi she had a couple of days to review and execute the corrective action plan, if she wanted to remain employed for the upcoming year.

8. Termination

Following the meeting, Levi was upset and spoke to other teachers, including Geisler, about the meeting and the documents, and she sent text and email messages to board members Sharon Wolfe and Michael McGovern. In her text message to Wolfe, Levi stated that Williamson had given her a letter to sign admitting that she told 10 -15 people to send letters to the board and that she would be fired if she did not sign it by Friday. She stated "That is extortion as I DID NOT do that!" (R. Exh. 17, p. 5). Levi also reiterated that she had raised concerns with Hicks that were shared by others, and that people came to her with questions and concerns because there was no human resources representative. She added that Williamson or Burton likely talked to other employees and "insisted they stretch the truth to make it look like I solicited them to get [Williamson] fired. I did no such thing." (R. Exh. 17, p. 6). Levi concluded the text by stating "Sorry about contacting you, but [Hicks] clearly believes [Williamson] and does not support or acknowledge any of my issues to be valid." (R. Exh. 17, p. 7). In her May 8 email to McGovern, Levi attached a copy of the Summary of Concerns and Corrective Action Plan and stated "I will not sign this. I did nothing wrong and these statements are damaging and untrue." (R. Exh. 16).

After learning of these communications, Williamson and Burton informed Levi that they were revoking her contract for the 2018/2019 school year. They would allow her to remain and finish out the rest of the 2017/2018 school year, but she would not be returning. Levi finished out the school year.

CONTENTIONS OF THE PARTIES

The General Counsel alleges Respondent violated Section 8(a)(1) of the Act when it: (1) issued Levi the Summary of Concerns and Corrective Action Plan; (2) verbally and in writing informed her that, as a condition of maintaining future employment with Respondent, she had to agree that engaging in the sort of conduct she had engaged, or was believed to have been engaged in, constituted wrongdoing; and (3) later withdrew/terminated Levi's employment contract for the 2018-2019 school year after she discussed and showed the summary and corrective action plan to others. Respondent contends Levi's conduct was not protected or concerted, but rather personal griping.

LEGAL ANALYSIS

A. Respondent violated Section 8(a)(1) of the Act when it issued Levi the Summary of Concerns & Corrective Action Plan.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Section 7 guarantees employees the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 7 protects the right of employees to "seek to improve working conditions through resort to . . . channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978).

Activity is "concerted" if it is engaged in with or on behalf of other employees, and not solely by and on behalf of the employee. *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). This includes "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II*, 281 NLRB at 887. See also *Phillips Petroleum Co. & Paper*, 339 NLRB 916, 918 (2003); and *Whittaker Corp.*, 289 NLRB 933 (1988). Notably, the requirement that activity must be engaged in with the object of initiating or inducing group action does not disqualify merely preliminary discussion from protection under Section 7. Inasmuch as almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

The Board has recognized the activity of a single employee in enlisting the support of his or her fellow employees for their mutual aid and protection is as much concerted activity as is ordinary group activity. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153-154 (2014); *Whittaker Corp.*, supra at 933. Additionally, concertedness is not dependent on a shared objective or on the agreement of one's coworkers with what is proposed. See e.g., *Circle K Corp.*, 305 NLRB 932, 933 (1991); and *Meyers II*, 281 NLRB at 887. However, concerted activity does not include mere griping or other conduct that does not envision group action or seek changes affecting the group. See *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984). See also *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 1 (2019) (individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun).

The concept of mutual aid or protection focuses on the goal of concerted activity; chiefly, whether the employee(s) involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. *Eastex, Inc. v. NLRB*, supra at 565. In short, proof employee action inures to the benefit of others is proof the action is for mutual aid or protection. See *Fresh & Easy Neighborhood Market*, supra at 153, 155-156; and *Anco Insulations, Inc.*, 247 NLRB 612 (1980).

An employer violates Section 8(a)(1) of the Act when it disciplines or discharges an employee because he/she engaged in, or is believed to have engaged in, concerted activity for the purpose of mutual aid or protection. See *Hyundai Motor Mfg. Alabama, LLC*, 366 NLRB No. 166, slip op. at 2 (2018) (finding unlawful discharge based on belief employees engaged in protected concerted activity, regardless of whether they actually did so); *United States Service Industries*, 314 NLRB 30, 31 (1994) enfd. mem. 80 F.3d 558 (D.C. Cir. 1996); and *Desert Pines Golf Club*, 334 NLRB 265, 275 (2001). The framework for analyzing alleged violations of Section 8(a)(1) turning on employer motivation is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected concerted conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took an adverse action against the employee. If established, the burden then shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399-403 (1983); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). An employer cannot simply present a legitimate reason for its action; rather, it must persuade by a preponderance of the evidence that the same action would have taken place in the absence of the protected conduct. *Serrano Painting*, 332 NLRB 1363, 1366 (2000).

The complaint alleges that Respondent violated Section 8(a)(1) of the Act when it issued Levi the Summary of Concerns and Corrective Action Plan. This combined written warning and last-chance agreement clearly states Levi was being disciplined because of her April 10 email to Hicks, her failure to follow the MPSS, and her efforts to "recruit" other teachers to email Hicks about school leadership. The issue is whether this constitutes protected, concerted activity. In his post-hearing brief, the General Counsel alleges Levi's email to Hicks and her efforts to solicit other teachers to email Hicks about their concerns constituted protected, concerted activity. (GC Br. 13). I agree.

Levi's April 10 email was concerted activity because it was written with and on behalf of other teachers. She spoke with Geisler and others about several of the concerns in her email and advised them that she intended to email the chairman about those concerns. She later showed Geisler a draft of the email before sending it to ensure that it covered what they had discussed. Geisler told Levi the email looked good, and he planned to write one to Hicks as well. Other teachers informed Levi that they were concerned about retaliation if they emailed Hicks, but they requested that Levi still send her email. Although Levi's April 26 email to Williamson stated that she told teachers she could not speak for them and they had to speak for themselves and share their concerns, I find Respondent knew or believed Levi was engaged in concerted activity--at least as it related to her and Geisler--when Geisler spoke to Burton and confirmed the "rumors" he and Levi were asking questions and writing board members about the pay scale, the gala, and other matters. Additionally, during her April 26 meeting with the administrators, Levi stated the concerns she raised were shared concerns, not just hers.

Levi's April 10 email was protected because it was an attempt to inform Hicks about several workplace issues affecting teachers, including the lack of a human resources representative with whom the teachers could ask questions or raise concerns, the display of favoritism for certain employees, the lack of an accurate or developed salary scale with established criteria for raises, general communication issues

between management and employees, the lack of support from, and trust in, school administration, and the fear of retaliation by administration for raising workplace issues. The Board has held these types of complaints relate to terms and conditions of employment, and, therefore, are protected. See generally, *North Carolina License Plate Agency #18*, 346 NLRB 293 (2006) (complaints about wages protected); *Rogers Environmental Contracting, Inc.*, 325 NLRB 144 (1997) (same); *Needell & McGlone, P.C.*, 311 NLRB 455, 456 (1993), *enfd. mem.* 22 F.3d 303 (3d Cir. 1994) (complaints about preferential treatment protected); *Hansen Chevrolet*, 237 NLRB 584 (1978) (employee inquiry about wage system protected); *Scientific-Atlanta, Inc.*, 278 NLRB 622, 624-625 (1986) (discussion of wages is protected); *Calvin D. Johnson Nursing Home*, 261 NLRB 289 (1982) (complaints about supervisors' treatment protected); and *Avalon-Carver Community Center*, 255 NLRB 1064 (1981) (same).¹⁰ Levi's email further states she was willing to meet with Hicks and discuss these concerns in greater detail.¹¹ I, therefore, conclude Levi was engaged in protected, concerted activity when she sent her April 10 email to Hicks raising these collective concerns for their mutual aid and protection.

Levi also was engaged in protected, concerted activity when she solicited teachers to email Hicks about their collective concerns. She was seeking to initiate or induce collective action for their mutual aid and protection, because, as she stated, hearing from multiple employees about their shared concerns would be more effective than hearing from just her. The Summary of Concerns states Levi approached staff "a few times in an attempt to convince them to join [her] in [her] letter writing campaign" and she was "working to get around 15-20 people to join [her] in order to make the board aware of issues with the administration." All of which Respondent claims is behavior that "runs counter to our values, our problem-solving process, actively undermines our community, and contributes to a toxic culture."

Respondent contends Levi was engaged in unprotected personal griping, stemming from her dissatisfaction with her performance evaluation and salary increase. I reject this argument. First, griping about terms and conditions of employment is unprotected if it is done without any aim toward group action. *Mushroom Transportation Co. v. NLRB*, 330 F.2d at 685. Second, the reason why an employee seeks to initiate, induce, or prepare for group action--whether altruistic or selfish--is irrelevant; what is relevant is whether the employee seeks to do so for mutual aid and protection. *Alstate Maintenance*, *supra* slip op. at 4 fn. 18. As stated, I find Levi was raising collective concerns in her April 10 email, and she was seeking to get her co-workers to do the same by asking them to email Hicks, with the goal of making Hicks aware of those concerns. The reasons for involving Hicks were because there was no human resource representative, and Levi and other teachers feared retaliation if they went to administration with their concerns.

Furthermore, the evidence establishes Respondent was aware the concerns Levi raised were not limited to just her. Again, Burton knew from his conversations with Geisler that he and Levi were concerned about the pay scale, the gala, and other issues, and that they were asking questions and writing board members. Later, when Burton asked Geisler to write that Levi "coerced" him into supporting her and writing emails to the board, Geisler refused, stating that was not true. Although more vague, Angie Bell sent a separate email to Hicks about concerns "with some administrative decisions." She inquired whether the school would be hiring a human resources representative that she could consult with about

¹⁰ Respondent contends Levi's complaints about favoritism in selecting ambassadors for the gala were not protected because teachers were not required to attend the gala; therefore, whether or how they attended had no bearing on their employment. While I agree, and note the General Counsel made no argument as to how voluntary attendance at the gala related to their terms and conditions of employment, I also note Levi's email states the gala is "just [one] example" of how the school administrators' perceived favoritism and lack of respect was affecting staff morale.

¹¹ Similarly, Geisler testified his email to Hicks referred to the teacher pay scale and the gala in general terms because he was anticipating the chance to speak with Hicks and have a more detailed discussion about those matters.

those concerns, stating “this sentiment is common throughout the school.” Bell also stated “an anonymous survey” to the staff “asking about concerns in the building” would be helpful.

Respondent also argues Levi’s conduct was not protected because her April 23 email to Hicks stated her April 10 email was written “to inform the board about concerns already discussed with administration, not for answers.” Respondent argues this proves Levi was not attempting to improve the teachers’ terms and conditions of employment or their lot as employees. I reject this argument as well. Levi was responding to Hicks’ suggestion that she raise the concerns in her email with the administration and go through the MPSS for answers. She responded to Hicks that she already notified school administrators, including Williamson, about the concerns, and she was not comfortable meeting with him again. Levi was attempting to go above Williamson—to his boss—to make Hicks and the board aware of the shared concerns, and to discuss them with him, not Williamson, because she and other teachers did not trust Williamson and were concerned he would retaliate against them.¹²

Respondent cites to *Lutheran Social Service of Minnesota*, 250 NLRB 35 (1980) and *Good Samaritan Hospital & Health Center*, 265 NLRB 618, 626 (1982) for support. In *Lutheran Social Service of Minnesota*, the Board held that employees at a home for troubled youth who constantly complained about the condition of the program, planned policy changes, and a perceived lack of competency of the program management, which, in their view, threatened the quality of care, the quality of the program, and the welfare of the children in the program, were not engaged in protected activity because their complaints were not directed toward any particular object related to their terms and conditions of employment. The Board adopted the finding that the employees’ behavior was “aimless and undirected, consisting of unremitting complaining ... [and] a point was reached when, particularly in view of the directionless nature of the carping ... too much was enough.” 250 NLRB at 43. Similarly, in *Good Samaritan Hospital*, the Board held the hospital’s occupational therapists who repeatedly complained about management of the hospital’s developmental learning program and expressed numerous concerns about the competency of the program director, the quality of the care offered, and the welfare of the children were not engaged in protected conduct because those managerial concerns did not directly relate to, and there was no goal to address matters relating to, their terms and conditions of employment. The Board adopted the judge’s finding that despite the employer’s “many efforts” to address the disputes, the situation substantially worsened to the point the employer made the choice between discharging the employees “who by their constant criticism were the main causes of the tension which adversely affected every staff member” or give in and remove the manager. 265 NLRB at 627.

I find these cases are inapposite. First, there is no evidence Levi had a history of being a malcontent, or that she repeatedly attacked the administration or managerial policies related to the mission or operation of the school. She enumerated specific concerns, shared by others, and several of those concerns directly related to the teachers’ terms and conditions of employment. The only managerial decision Levi mentioned was the new math program for the lower division, and her stated criticism was not about the program, but rather that Respondent waited until the selection was made before soliciting input from the teachers, which Levi stated demonstrated a lack of respect. The only personal criticism Levi raised about Williamson in her email was his noticeable absence from certain school events. Second, Respondent did not hold multiple

¹² The Summary of Concerns alleges Levi lied during the April 26 meeting about not recruiting employees to write emails to Hicks, and Respondent relied upon that to argue Levi’s continued employment was inconsistent with the school’s policy of open and honest problem solving. Assuming *arguendo* that Levi lied during the meeting, it does not justify the discipline. The Board has held a lie that does not relate to the performance of the employee’s job or the employer’s business, but to a protected right guaranteed by the Act, which the employee was not obligated to disclose, does not lose the protection of the Act, and cannot serve as the basis for discipline. See *Tradewaste Incineration*, 336 NLRB 902, 907 (2001). This is particularly true where the lie occurs during an unlawfully motivated disciplinary investigation. See *Supershuttle of Orange County, Inc.*, 339 NLRB 1, 2 (2003).

meetings in an attempt to address the concerns Levi raised. Instead, Williamson called Levi into a meeting, accused her of trying to get him fired, attempted to isolate the concerns as belonging solely to her, and then criticized her for writing Hicks and soliciting others to do the same in an effort to divide the community. Finally, Levi was not engaged in aimless or unrelenting complaining. She spoke with coworkers about their shared concerns, wrote her April 10 email to Hicks and asked others to do the same, informed Hicks and Williamson about her concerns with meeting with Williamson about those concerns, and then, after she received her Summary of Concerns and Corrective Action Plan, complained to others about the retaliation for her protected, concerted conduct. As the cited cases establish, there are limits to what an employer must tolerate from employees voicing concerns, but, unlike in these cases, I find based on the totality of the circumstances that Levi did not exceed those limits by her statements and conduct.

Based on the evidence, I find the General Counsel met his burden. Levi was engaged in protected, concerted activity when she sent her April 10 email to Hicks raising collective concerns and when she solicited others to do the same. Respondent knew or believed Levi was engaged in such activity and had animus toward that activity. The clearest evidence of animus is in the Summary of Concerns itself, which summarizes Levi's actions, including the protected activity, and states that her "behavior runs counter to our values, our problem-solving process, actively undermines our community, and contributes to a toxic culture...[and] is completely unacceptable."

Once established, the burden shifted to Respondent to show that it would have taken the same action in absence of Levi's protected activity. Respondent, however, failed to present any evidence toward this burden. For example, there was no evidence of comparable discipline or action taken against any other employee for similar conduct, or that Respondent would have taken the same action in the event comparable conduct occurred. Respondent simply asserts it would have taken the same action, which is insufficient to meet its burden under *Wright Line*.¹³

I, therefore, find Respondent violated Section 8(a)(1) of the Act when it issued Levi the Summary of Concerns and Corrective Action Plan because of her protected, concerted activity.

B. *Respondent independently violated Section 8(a)(1) of the Act when Williamson verbally and in writing informed Levi that, as a condition of maintaining future employment with Respondent, she would have to agree to refrain from engaging in this sort of protected, concerted activity.*

As stated, the Summary of Concerns and Corrective Action Plan, as well as Williamson's statements to Levi during the May 7 meeting, conditioned her continued employment on her agreeing to cease this pattern of "unacceptable" behavior moving forward. The test for whether there has been a violation of Section 8(a)(1) of the Act is whether the statements or conduct in question would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Multi-Ad Services*, 331 NLRB 1226, 1227-1228 (2000) *enfd.* 255 F.3d 363 (7th Cir. 2001). It is well settled that in evaluating the statement or conduct at issue, the Board does not consider the motivation or the actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001). Under the circumstances, I find Williamson's statements prohibiting Levi from engaging in conduct that is protected, concerted activity violated of Section 8(a)(1) of the Act. See *Flex Plastics, Inc.* 262 NLRB 651, 659 (1982) (requiring an employee to agree to refrain from statutorily protected activity as a condition of remaining employed

¹³ Respondent argues that under *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964), there was no violation. Under *Burnup & Sims*, an employer violates Section 8(a)(1) of the Act by disciplining or discharging an employee based on a good-faith belief that the employee engaged in misconduct during otherwise protected activity, if the General Counsel shows that the employee was not, in fact, guilty of that misconduct. Respondent failed to specify how or why it believed Levi was engaged in disqualifying misconduct, other than her failing to follow the MPSS, which, as stated below, I do not find to be misconduct.

unlawful). See also *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403 (1993) (document that directed employee to stop expressing complaints about employment conditions violated Section 8(a)(1) because it constituted a threat of future reprisal for protected activity); and *Denson Electric Co.*, 133 NLRB 122, 129, 131 (1961) (employer cannot require employees to waive statutory rights as a condition of employment or reinstatement, and a discharge for failure to relinquish Sec. 7 rights violates the Act).

Furthermore, at the May 7 meeting and in the Summary of Concerns and Corrective Action Plan, Respondent *required* that Levi agree “to follow the MPSS and work through the appropriate channels when a disagreement arises,” and “[c]ommit[] to seeking out the lower division head, associate head of school, and/or head of school to assist in the process.” The Board has repeatedly held policies mandating that employees follow a certain process or procedure in raising and resolving issues unlawfully restrict the employees’ ability to exercise their Section 7 rights. See *AFSCME Local 5*, 364 NLRB No. 65, slip op. at 3-4 (2016) (employer violated the Act by maintaining a work rule requiring employees to present any concerns directly to the president and by suspending and later discharging an employee/union officer because she concertedly complained to an executive board member in violation of the rule); *Affinity Medical Center*, 362 NLRB 654, 672 fn. 41 (2015) (an employer may not require employees to take all work-related complaints to their employer through “the chain of command”); *Valley Hospital Medical Center*, 351 NLRB 1250, 1254 (2007) (an employer may not require employees to take all work-related concerns through a specific internal process), *enfd.* sub nom. *Nevada Service Employees Union, Local 1107*, 358 Fed. Appx. 783 (9th Cir. 2009); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171 fn. 1 (1990); and *Guardsmark, LLC*, 344 NLRB 809 (2005), *enfd.* in relevant part 475 F.3d 369 (D.C. Cir. 2007). Cf. *U-Haul Co. of California*, 347 NLRB 375, 378 (2006) (statement in handbook requiring employees to bring work-related complaints first to management was not unlawful because it appeared in the same paragraph and immediately followed employer’s assertion that employees can speak up for themselves at all levels of management and would be given a responsible reply; and nothing else in the handbook foreclosed employees from using other avenues).¹⁴ I find Respondent’s requirement that Levi follow the MPSS and seek out administrators to assist in that process violates Section 8(a)(1) of the Act.¹⁵

¹⁴ Although the MPSS states it is not intended to limit employees’ rights to engage in protected, concerted activity, it was applied to do just that in this case. The Corrective Action Plan required Levi to follow the MPSS and involve administrators whenever a disagreement arises, a requirement imposed in response to her protected activity.

¹⁵ Although there is no specific allegation regarding the requirement that Levi follow the MPSS and involve administration when raising or pursuing concerns, I find it is closely connected to paragraph 5 of the complaint, which alleges that Respondent, through Williamson, violated Section 8(a)(1) of the Act when it verbally and in writing told Levi that, as a condition of maintaining future employment with Respondent, she had to agree that engaging in concerted activities with other employees for mutual aid and protection constituted wrongdoing. It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990); and *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995). I find that part of Williamson’s oral and written directive to Levi on May 7 was that she was, as a condition of her continued employment, to cease her protected activity *and* follow the MPSS process and involve administrators in that process when she has disagreements. I find these unlawful requirements regarding the MPSS are closely connected to the subject matter of the above complaint allegation, because they all occurred at the same time and they are part-and-parcel of Respondent’s unlawful response to Levi’s Section 7 activity. I also find the matter has been fully litigated. Respondent has presented evidence regarding oral and written statements, including the imposition of the requirement that Levi follow the MPSS and involve the administrators, as well as its reasons for having the MPSS, and it has presented evidence and argument to support its position that those statements and conduct did not violate the Act.

C. Respondent violated Section 8(a)(1) of the Act when it withdrew/terminated Levi's employment contract for the 2018/2019 school year, thereby terminating her employment, because of her protected activity.

In its post-hearing brief, Respondent states it withdrew/terminated Levi's 2018/2019 employment contract because she spoke to other teachers and board members about the contents of the May 7 meeting and showed them the Summary of Concerns and Corrective Action Plan, and allegedly described the Corrective Action Plan in "inflammatory and insinuating terms." (R. Br. 22). Respondent does not specify in its brief what inflammatory and insinuating terms Levi allegedly used to describe the Corrective Action Plan, but Williamson testified he was troubled by her reference to it as an "extortion contract." (Tr. 406-407). Respondent contends that by engaging in this conduct, Levi "demonstrated that she did not want to strive to communicate in a more productive manner or work with administration" and, instead, "continued to refuse to cooperate with Marburn's processes and create a negative and tense environment for Marburn's community partners and children." (R. Br. 22).¹⁶ Respondent asserts it was justified in deciding to withdraw Levi's employment because of the manner in which she behaved, and her refusal to follow the MPSS; not as a result of any protected concerted activity. Respondent further contends that its decision was justified because it believed she had engaged in misconduct, based on her demonstrated inability to comply with the terms of the Corrective Action Plan, which required her to meet with the administrators and participate in the problem-solving process. (R. Exh. 22).

Respondent withdrew/terminated Levi's employment because it believed she had not complied, and would not comply, with the terms of the Summary of Concerns and the Corrective Action Plan, including the requirement that she follow the MPSS, based on her statements to teachers and board members after the May 7 meeting. (Tr. 355-356). As stated, the Summary of Concerns and Corrective Action Plan, and the requirement therein that Levi follow the MPSS in handling disagreements, unlawfully restricted Levi's statutory rights. Therefore, I find Respondent further violated the Act when it elected not to renew/terminated Levi's employment because she failed to adhere to those unlawful restrictions. See generally, *Southern Bakeries, Inc.*, 366 NLRB No. 78, slip op. at 2-3 (2018); and *Frazier Industrial Company*, 328 NLRB 717(1999).

Furthermore, employees have the Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers. *Banner Health System*, 362 NLRB No. 137, slip op. at 3 (2015); *Fresh & Easy Neighborhood Market*, supra slip op. at 5-6; *Verizon Wireless*, 349 NLRB 640 (2007); and *Desert Palace, Inc.*, 336 NLRB 271, 272 (2001). When Respondent conditioned Levi's continued employment on her agreeing to "follow the MPSS and work through the appropriate channels" and "commit[] to seeking out the LD Division Head, Associate Head, and/or the Head of School to assist in the process[.]" it restricted Levi's Section 7 rights to discuss the May 7 disciplinary meeting and the discipline she received with co-workers or others, because that would involve her going outside of the MPSS process. I, therefore, find Respondent elected not to renew/terminated Levi's employment, in part, because she failed to adhere to this unlawful restriction, in violation of Section 8(a)(1) of the Act. *Southern Bakeries, Inc.*, supra at 2-3.

The final issue is whether Levi engaged in misconduct or conduct that lost the protection of the Act by speaking to others following the May 7 meeting. As stated, Respondent focuses on Levi's apparent refusal to follow the MPSS and her characterization of the May 7 meeting and the Summary of Concerns and Corrective Action Plan as "extortion" as disqualifying her from continued employment. In *Meyer Tool*,

¹⁶ Respondent failed to present any evidence, or make any specific argument, as to how Levi's conduct created a negative and tense environment for its community partners or students. Levi reached out to teachers and board members following the May 7 meeting, before Respondent withdrew her employment contract; there is no evidence she attempted to enlist "community partners" or students during that period of time.

Inc., 366 NLRB No. 32, slip op. at 10-11 (2018), the Board held that when an employer defends a discharge based on employee misconduct that is a part of the *res gestae* of the protected concerted activity, the employer's motive is not at issue. Instead, such discharges are considered unlawful unless the misconduct at issue was so egregious as to lose the protection of the Act. To answer this question, the Board balances employees' right to engage in concerted activity, allowing some leeway for impulsive behavior, against employers' right to maintain order and respect. To determine whether an employee loses the Act's protection, the Board balances four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. *Id.* (citing to *Atlantic Steel Co.*, 245 NLRB 814 (1979)).

In applying these factors, I find Levi did not engage in misconduct or lose the protection of the Act. She was upset following the May 7 meeting, believing that she had been threatened with discharge for raising collective concerns. She vented her frustrations to other teachers and certain board members, primarily through text and email messages, while seeking their support or assistance. There is no evidence that Levi's actions disrupted the operation of the school or interfered with employees' ability to perform their work. As for the nature of the outburst, the focus is on Levi's use of the word "extortion." Although "extortion" has strong connotations, the term "extort" is defined as "to obtain by coercion, intimidation, or psychological pressure." *The American Heritage Dictionary of the English Language* (5th ed. 2019). However, in this case, Respondent conditioned Levi's continued employment on her agreeing to forego a critical statutory right, which, under the circumstances, I find constitutes "coercion." Finally, it was Respondent's unlawful conduct that led Levi to use the term. As a result, I find all of the factors favor continued protection.

Based on the foregoing, I find Respondent violated Section 8(a)(1) of the Act when it withdrew/terminated Levi's employment contract, thereby terminating her employment.¹⁷

CONCLUSIONS OF LAW

1. Respondent, Marburn Academy, Inc. is an employer engaged in commerce out of its New Albany, Ohio facility within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following conduct, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act:

(a) Disciplined Michqua Levi by issuing her the Summary of Concerns and Corrective Action Plan;

(b) Conditioning Levi's continued employment on her agreeing to refrain from engaging in protected, concerted activity in the future;

(c) Requiring Levi to follow the Marburn Problem-Solving System to resolve disagreements and commit to seeking out the lower division head, associate head of school, and/or head of school to assist in the process; and

¹⁷ Although not argued, Levi's separation is analogous to a constructive discharge in which an employer confronts an employee with the Hobson's choice of either continuing to work or foregoing rights protected by the Act, and the employee resigns. *Intercon I (Zercom)*, 333 NLRB 223 (2001), citing *Multimatic Products*, 288 NLRB 1279, 1348 (1988). See also *Remodeling by Oltmanns*, 263 NLRB 1152, 1162 (1982), *enfd.* 719 F.2d 1420 (8th Cir. 1983).

(d) Withdrawing/terminating Levi's employment contract, thereby terminating her employment.

3. The foregoing unfair labor practices affect commerce within the meaning of Section 2(2) and 2(7) of the Act.

REMEDY

Having found that Respondent violated Section 8(a)(1) of the Act, I recommend an order requiring that it offer Michqua Levi full reinstatement to her former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with the decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall compensate Levi for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Additionally, Respondent shall be required to compensate Levi, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).¹⁸ Finally, Respondent shall be ordered to rescind and remove from its files any reference to the Summary of Concerns and Corrective Action Plan issued to Levi on May 7, 2018, as well as the withdrawal/termination of her employment contract, and to notify her in writing that this has been done and that none of these adverse actions will be used against her in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

ORDER

Respondent, Marburn Academy, Inc, at its New Albany, Ohio facility, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Disciplining, withdrawing employment contracts, discharging, or otherwise discriminating against employees because they engage in statutorily protected activity.

(b) Conditioning continued employment on employees agreeing to refrain from engaging in statutorily protected activity.

¹⁸ The General Counsel argues Levi is entitled to consequential damages. It would require a change in Board law for me to award consequential damages. See e.g., *Guy Brewer 43 Inc.*, 363 NLRB No. 173, slip op. at 2 fn. 2 (2016). Since I must follow existing Board law, and current law does not authorize me to award consequential damages, the General Counsel must direct its request to the Board.

¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Requiring employees to follow the Marburn Problem-Solving System to resolve disagreements and commit to seeking out the lower division head, associate head of school, and/or head of school to assist in the process.

(d) In any like or related manner interfere with, restrain, or coerce employees in the exercise of their statutory rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Michqua Levi reinstatement to her former job, or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses, and rescind and remove from its files any reference to the Summary of Concerns and Corrective Action Plan issued to Levi on May 7, 2018, as well as the withdrawal/termination of her employment contract, and to notify her in writing that this has been done and that none of these adverse actions will be used against her in any way.

(b) Within 14 days after service by the Region, post at its facilities in New Albany, Ohio copies of the attached notice marked Appendix A.²⁰ Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places throughout its New Albany, Ohio facility, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has closed certain facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 7, 2018.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. February 14, 2019



ANDREW S. GOLLIN
ADMINISTRATIVE LAW JUDGE

²⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT
FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL NOT threaten you because you engaged in statutorily protected activity.

WE WILL NOT discipline, withdraw your employment contract, discharge, or otherwise discriminate against you because you engage in statutorily protected activity.

WE WILL NOT condition your continued employment on you agreeing to refrain from engaging in statutorily protected activity.

WE WILL NOT require employees follow the Marburn Problem-Solving System to resolve their disagreements and commit to seeking out the lower division head, associate head of school, and/or head of school to assist in the process.

WE WILL offer Michqua Levi reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Michqua Levi whole for any loss of earnings and other benefits resulting from her unlawful discipline and discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Michqua Levi for the adverse tax consequences, if any, of receiving a lump sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL rescind the Summary of Concerns and Corrective Action Plan issued to Levi and remove from our files any reference to that discipline, as well as the subsequent withdrawal/termination of her employment contract, and we will notify her in writing that this has been done and that the discipline and discharge will not be used against her in any way.

MARBURN ACADEMY, INC.
(Employer)

DATED: _____ **BY** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website

John Weld Peck Federal Building, 550 Main Street, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/09-CA-224092 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3733.